Supreme Court, U.S.
FILED
SEP 10 2009
OFFICE OF THE CLERK

(3)

No. 09-128

IN THE

Supreme Court of the United States

WILLIAM COVALT, INDIVIDUALLY, LOREN MORGAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LINDA COVALT, DECEASED, PETITIONERS

v.

ALLSTATE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

HENRY A. MEYER III
Meyer & Leonard P.L.L.C.
116 East Sheridan,
Suite 207
Oklahoma City, OK 73104
(405)702-9900

Attorney for Petitioner
William Covalt

DUKE HALLEY
Counsel of Record
Halley & Talbot Law Firm
13901 Quail Pointe Drive
Oklahoma City, OK 73134
405-602-5600

Attorney for Petitioner
Loren Morgan

CURRY & TAYLOR • (202) 393-4141

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 1

SUMMARY OF REPLY 1

FACTUAL CLARIFICATION 2

I. THE FEDERAL DECLARATORY JUDGMENT ACT IS NOT A MECHANISM TO RESOLVE COMPETING PUBLIC POLICIES OF DIFFERENT STATES. 2

II. THE FEDERAL COURTS RULING DID CHANGE THE LAW TO BE APPLIED TO THE REAL PLAINTIFF'S LAWSUIT. THE NEW MEXICO COURT FELT COMPELLED TO GIVE FULL FAITH AND CREDIT TO THE FEDERAL COURT'S RULING. AS A RESULT, NEW MEXICO WAS FORCED TO APPLY OKLAHOMA LAW EVEN THOUGH DOING SO VIOLATED NEW MEXICO'S PUBLIC POLICY. 3

III. THE LOWER COURTS HAVE CONSTRUED MISSION TO SAY CHOOSING ONE FORUM OVER ANOTHER, WHERE THE DIFFERENCE IN FORUM CHANGES THE LAW THAT APPLIES TO THE CASE, IS AN IMPROPER REASON FOR BRINGING A DECLARATORY JUDGMENT ACTION. 4

IV. ERIE REQUIRES THAT FEDERAL DIVERSITY JURISDICTION NOT ENABLE A LITIGANT TO ACHIEVE A RESULT IN FEDERAL COURT DIFFERENT THAN WOULD OCCUR IN STATE COURT. 6

TABLE OF AUTHORITIES

Page

CASES

Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 62 S.Ct. 1173 (1942) 1
Dresser, Inc. v. Lowry 320 F.Supp 2d 486 (W.D. La, 1970) 5
Pennsylvania General Insurance Company v. Caremarkpcs 2005 WL 2041969 5
Sherwin-Williams Co. V. Holmes County, 343 F.3d, 383 (C.A. 5, 2003) 5, 6
Van Dusen v. Barrack. 376 U.S. 612 (1964) 1
Wilton v. Seven Falls Co., 515 U.S. 177, 115 S.Ct. 2137 (1995) 1

SUMMARY OF REPLY

Allstate presents this case as a simple insurance coverage dispute. In fact, it is a choice of law dispute. Allstate knew that the New Mexico choice of law rule was to apply the law where the accident happened. Consequently, if New Mexico was the forum deciding the issue, the drop down provision would not be enforced. To avoid that result Allstate filed this case in federal court in Oklahoma.

The lower court's in the Fifth Circuit have interpreted *Mission Insurance Co. v. Puritan Fashions Corp.* as Petitioner's have, i.e. that choosing one forum over another where the difference in forum changes the law that applies to the case is an improper reason for bringing a declaratory judgment action. 706 F.2d 599 (5th Cir.1993), footnote 3. That conclusion is consistent with this Court's warning that the act not be used to interfere with state issues being simultaneously addressed by a state court. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S.Ct. 1173 (1942), and *Wilton v. Seven Falls Co.*, 515 U.S. 177, 115 S.Ct. 2137 (1995). It also is consistent with Erie concerns this Court addressed under similar circumstances in *Van Dusen v. Barrack*. 376 U.S. 612 (1964).

Allstate's claim that Erie is not implicated except in instances where the federal and state court are sitting in the same state is not correct. *Van Dusen* held that Erie principles applied when the laws of different states were at issue and that a non resident should not be allowed to achieve a result in federal court that could not be achieved in the state where the plaintiff filed the lawsuit. Allstate denies that was the

result here. But, in fact, that is exactly what occurred. By filing the declaratory judgment action Allstate achieved what it could not have achieved in New Mexico, where the real plaintiff filed suit.

In *Van Dusen* this court saw the importance of preventing manipulation of choice of law questions by use of a federal statute that was procedural and discretionary. The Federal Declaratory Judgment Act is both procedural and discretionary. The issue presented here is just as important in the context of the declaratory judgment statute as it was regarding the change of venue statute involved in *Van Dusen.* Involved are issues of federalism and the importance of the interrelationship between state and federal courts.

FACTUAL CLARIFICATION

Allstate is correct that its lawsuit was filed only four days after the issue of whether Oklahoma or New Mexico law applied came to a head. It fails to acknowledge that two of those days were on a weekend and one was a federal holiday. The present lawsuit was filed the first day the courthouse was open. App. 36a, ft note 2.

ARGUMENT AND AUTHORITIES

I. THE FEDERAL DECLARATORY JUDGMENT ACT IS NOT A MECHANISM TO RESOLVE COMPETING PUBLIC POLICIES OF DIFFERENT STATES.

Stripped to its core Allstate's justification for exercise of jurisdiction is stated at page 7 of its brief. It asserts that a federal court was the proper forum to

resolve "competing public policies of two states". That contention, on its face, is in conflict with this Court's warning in *Brillhart and Seven Falls Co.* that exercising declaratory jurisdiction, when there is a concurrent state court action, should be considered vexatious, uneconomical and "gratuitous interference". The argument smacks of federalism at its extreme.

A District Court's discretion whether or not to exercise declaratory jurisdiction is not unlimited. That discretion, as well as the legislative grant of jurisdiction, is subject to Constitutional restrictions. In the present case the Erie doctrine is the constitutional restriction primarily involved.

II. THE FEDERAL COURTS RULING DID CHANGE THE LAW TO BE APPLIED TO THE REAL PLAINTIFF'S LAWSUIT. THE NEW MEXICO COURT FELT COMPELLED TO GIVE FULL FAITH AND CREDIT TO THE FEDERAL COURT'S RULING. AS A RESULT, NEW MEXICO WAS FORCED TO APPLY OKLAHOMA LAW EVEN THOUGH DOING SO VIOLATED NEW MEXICO'S PUBLIC POLICY.

Allstate first says that it was appropriate for the federal court to resolve the competing public policies that were presented. Yet, it then argues that the exercise of jurisdiction by the Oklahoma federal court did not change the law governing any issue involved. Those arguments are inherently inconsistent. The federal court was indeed deciding a dispute involving competing public policies. Once it decided to apply Oklahoma law Allstate sought, and obtained, a

judgment that the Order was due full faith and credit. The New Mexico Supreme Court felt compelled to apply Oklahoma law, even though doing so violates New Mexico's public policy. Stating that the Order entered in this case did not change the law that would have been otherwise applied to a plaintiff's lawsuit is therefore incorrect.

The Allstate policy provided coverage for incidents occurring in New Mexico. It permitted a lawsuit to be filed there and New Mexico law to apply in those proceedings. Absent interference by the Oklahoma federal court this would have been an uncomplicated wrongful death case rightfully tried in New Mexico under New Mexico law. Allstate does not seriously disagree that, had Petitioner's choice of forum not been interrupted by the Oklahoma federal court proceeding, any wrongful death judgment entered in New Mexico would have been enforced against Allstate up to the full liability limits of $2,250,000.00. Now, any judgment will be enforced at a maximum of $25,000.00.

Allstate's contention that the above result does not raise serious Erie issues is not correct.

III. THE LOWER COURTS HAVE CONSTRUED MISSION TO SAY CHOOSING ONE FORUM OVER ANOTHER, WHERE THE DIFFERENCE IN FORUM CHANGES THE LAW THAT APPLIES TO THE CASE, IS AN IMPROPER REASON FOR BRINGING A DECLARATORY JUDGMENT ACTION.

Petitioner's interpretation of *Mission Ins. Co. v. Puritan Fashions Corp.* 706 F.2d 599 (5th Cir. 1983) is

that it held using the federal declaratory judgment act is improper if doing so changes the law that applies to the case. The Fifth Circuit stated as much in the later case of *Sherwin-Williams Co. V. Holmes County*, 343 F.3d, 383, 397 (C.A. 5, 2003) FN6, 399. Numerous lower courts have stated the same.[1]

Petitioner believes that legal concept is a correct one, if Allstate's true motive for bringing the declaratory action is considered. Allstate claims, at page 16 of its brief, that it was "allowed" to invoke diversity jurisdiction in a "neutral" federal court. However, it was not neutrality that Allstate sought. It was seeking a favorable choice of law forum, in order to avoid New Mexico choice of law rules. Allstate does not claim otherwise. Nor has it provided any case that permitted the Act to be used in such a way.

Neither the Trial Court or the Tenth Circuit considered whether Allstate was using the act to avoid unfavorable law or to change the law that would otherwise have been employed in the state court action that was filed. As discussed below, that is a

---

[1] The district courts in the Fifth Circuit have cited *Mission* to the effect that "choosing one forum over another where the difference in forum changes the law that applies to the case" is "an improper reason for bringing a declaratory judgment". Or, stated conversely that "choosing one forum over another where the difference in forum does not affect the law that applies to the case" is a factor to consider in deciding whether to exercise jurisdiction. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 397, (C.A. 5, 2003)FN6, 399. *Pennsylvania General Insurance Company v. Caremarkpcs* 2005 WL 2041969 , FN 3(N.D. Tx., Dallas Division); *Capco International, Inc. v. Haas Outdoors, Inc.* 2004 WL 792671, FN 4 (N.D. Tx., Dallas Division); *Dresser, Inc. v. Lowry* 320 F.Supp 2d 486, 495, (W.D. La, 1970).

consideration required because of Erie concerns. Further, lack of such an analysis ignores this Court's Brillhart and Seven Falls warnings against interfering with concurrent state court proceedings.

IV. ERIE REQUIRES THAT FEDERAL DIVERSITY JURISDICTION NOT ENABLE A LITIGANT TO ACHIEVE A RESULT IN FEDERAL COURT DIFFERENT THAN WOULD OCCUR IN STATE COURT.

Allstate claims that the Erie policies only seek to prevent inconsistent results in cases between federal and state courts sitting in the same state. Pg. 16 of Allstate's brief. That is not correct. In *Van Dusen* a state court was not even involved. And, the issue was which of two state laws had to be applied. The issue was whether a federal procedural statute could be used to permit a litigant to "get a change of law as a bonus". *Van Dusen* at 636. The court concluded such a result would violate Erie.

Allstate says *Van Dusen* is not applicable because a transfer of venue did not occur, nor was it requested, in the present case. While it is true that a different procedural statute was involved, that does not mean the Van Dusen concerns are not relevant here.

The *Van Dusen* court was concerned that nonresidents, "properly subjected to suit in the transferor State not invoke section 1404 (a) to **gain the benefits of the law of another jurisdiction.**" id at 638, emphasis added. The same concern should exist here. There, as here, the concern was application of choice of law doctrines of different states. The only

difference is that the declaratory judgment statute was invoked here (as opposed to the change of venue statute) to "gain the benefit" of Oklahoma law and to destroy the wrongful death plaintiff's right to have New Mexico law apply.

Certiorari was granted in Van Dusen "to review important questions concerning the construction and operation of" the federal change of venue statute. *Van Dusen*, at 615. Here, it was the declaratory judgment act that was used as a choice of law tool. Whether that use is proper is an important question that should be addressed by this Court.

Respectfully submitted,

Duke Halley
Counsel of Record
Halley & Talbot Law Firm
13901 Quail Pointe Drive
Oklahoma City, OK 73134
405-602-5600